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No. 284.

In the

Supreme Court of the United States.

October Term, 1918.

GABE E. PARKER, Superintendent for the Five Civilized Tribes, *et al.*, - - - - - *Appellants,*

VERSUS

TOOTIE RILEY, a Minor, By U. C. STOCKTON, Her Guardian, *et al.*, - - - - - - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE TOOTIE RILEY

WILLIAM J. HORTON,
McAlester, Oklahoma;
RALPH A. SMITH,
Tulsa, Oklahoma;
Attorneys for Appellee, Tootie Riley.

AUTHORITIES CITED.

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The statement in the brief for appellants sufficiently sets forth the facts to present the question involved in this appeal.

Appellants' Propositions 1, 2, and 3 (appellants' brief page 6) are all based upon the single proposition that the interest of Julia Willingham, under section 9 of the Act of May 27, 1908, is a life estate. Such construction of that section, if we have correctly interpreted their argument, is made possible only by eliminating from the reading, in gathering the

after-born child's interest, the clauses enclosed in brackets by them on page 10 of their brief, "[inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,]" and the further clause, "[until April twenty-sixth, nineteen hundred and thirty-one]." This is a confession that the omission of these clauses from the reading is essential to make the section at all compatible with the theory of a life interest, and this is quite true. They say, in short, that these words were inserted "in connection with the life interest in the homestead given to after-born children" in order to avoid conflict with section 1. The error in this construction arises from the failure to first definitely fix in mind the cardinal purpose of the Act which was to remove the restrictions on alienation of Indian allotments, and the failure also to clearly analyze the precise restrictions. Section 1 broadly removes all restrictions with two specific exceptions as follows:

(1) All homesteads of allottees having half or more than half Indian blood;

(2) All surplus lands of allottees having three-quarters or more Indian blood.

All other restrictions were removed save these two classes, and even as to them the restrictions

were retained only until April 26, 1931, so that on that date restrictions entirely cease and no conceivable limitation on the transfer of Indian property longer remains.

Further provision was made, however, for the termination of the restriction retained as to the two excepted classes even prior to April 26, 1931, in two ways: *1*, by removal through the Act of the Secretary of the Interior, whose authority to do so was preserved in careful language; *2*, by death of the allottee as provided in section 9. By section 9, death operated as a wholesale removal of restrictions on conveyances by the heirs of the deceased allottee, with two exceptions, on the construction of the second of which the decision of this case depends. By the first exception or proviso, conveyances by the full-blood heirs were required to be approved by county courts of Oklahoma; by the second, it was said, as an exception to the announcement that the death of any allottee shall remove all restrictions, that in case the deceased allottee left issue born after March 4, 1906, that the homestead allotment "shall *remain* inalienable, *unless* restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, *until* April twenty-sixth, nineteen hundred thirty-

one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred thirty-one, the land shall then descend to the heirs, etc."

Now, then, since the restriction against the alienation of such homestead expired under section 1, as above pointed out, on April 26, 1931, why was it necessary to use the clause, "unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided by section one hereof," in order to avoid a conflict, as appellants claim, with the provision made for the after-born issue? Suppose the clause had not been left out, what would have been the meaning? Simply that the homestead would have "*remained*" for the "use and support" of such issue, during their life or lives, until April 26, 1931, the words "during their life or lives" being a favorite phrase in Indian legislation, as we will hereafter point out, and having no other significance than that the given period of restriction will be terminated by the earlier decease of the persons mentioned. On the theory that the interest of the after-born issue is bound to continue, at all events, until April 26, 1931, it was not only unnecessary to insert the clause in question, but contradic-

tory, because it makes provision for an earlier termination. On the theory that such interest was a life estate, the insertion of the clause instead of avoiding, makes a conflict, for it limits the use, at the outside, if restrictions be not removed, until 1931. Had the intention been, as appellants claim, to vest a life estate, it would have been necessary, instead of inserting, to omit the clause. But even had the clause not been inserted in the passage, leaving it, as it would then have stood, without any additional language evincing the creation of a life estate, the use and support interest would have still ceased on April 26, 1931, as otherwise there would result a conflict with section 1, which arbitrarily terminates all restrictions on that date. A constructon of one part of an act will not be adopted which is repugnant to some other provision of the act, and especially where such conflict would be between a subordinate provision and one which embodies the general scheme of the act, but such construction will be given, if possible, as will harmonize all parts. Section 1 sets forth the entire scheme of the removal of restrictions, terminating restrictions on homesteads of allottees of half or more than half Indian blood on April 26, 1931, and appellants' theory of a life estate, of any other interest in such homestead projected beyond that date, is in necessary conflict with section 1.

Appellants say, furthermore, (p. 11) that the clauses in question "were intended to have no other effect on that interest than to regulate the manner of its conveyance." The Act imposes no individual restrictions on the disposition by the after-born issue of the special interest in the homestead, and it is inconceivable that the removal of restrictions by the Secretary of the Interior, spoken of, could have any application to such interest. Besides, appellants expressly contend (p. 11) that the asserted life interest is not terminable by the removal of restrictions on alienation. How then could the language with reference to the removal of restrictions on the alienation of the homestead by the Secretary of the Interior, be said to "regulate the manner of the conveyance" of such life interest?

But take the further language in the latter part of section 9, "or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred thirty-one, the land shall then descend to the heirs, etc." If there was a life estate in the issue, why use the words "*before* April twenty-sixth, nineteen hundred thirty-one?" Why not have said "upon the death of the issue herein provided for," because such death might occur either before or after (more probably after) April 26, 1931—the ordinary phraseology for letting the remainder man in on the

death of the life tenant? The meaning is clear that this phraseology was adopted in connection with what had gone before to keep clear that the interest of the after-born issue would continue, unless terminated sooner by the Act of the Secretary, until April 26, 1931, provided such issue did not die before then; and if so, then the remainder men would be immediately let in, the estate having already been cast. *Bartlett* v. *Okla Oil Co.* (E. D. Okla.) 218 Fed. 380.

The omission of the bracketed clause, "inalienable unless restrictions, etc." contended for by appellants, would separate the entire clause from the verb "remain," which it clearly qualifies. The clause cannot be thus detached, for the word "inalienable" is inseparable from the word "remain." It is the "inalienability" that is to "remain." It is not said that the homestead is to "remain for the use and support" of such issue, but, that instead of being at once freed from restrictions by death of the allottee, it is to "*remain* inalienable," to the end, or so that, it may be for the use and support of the specified issue. The only way in which the issue could get such benefit, is for the homestead to "remain inalienable" for the period, or on the contingency mentioned.

Appellants say (p. 11) that the courts below ruled "that the life estate of the child Julia was term-

inable by the removal of restrictions on alienation of the land," and complain of this ruling on the ground that the life estate is not terminable by the removal of restrictions. The answer to this is, in the first place, that the courts below did not rule that such "life estate" was thus terminable but, on the contrary, held that there was no life estate in Julia. It is not necessary to discuss what would be the effect of a mere order of removal of restrictions not followed by an actual alienation under the order of removal, as that question is not presented; suffice it to say that the purpose of the second proviso of section 9 was to preserve the homestead from sale for the use and support of the late born child during the specified period, the converse showing that a sale would oust such use and support. It is but common sense to say that if the homestead should be sold, the minor child could no longer have the use of it; and hence the lower courts held that the alienation in part of the homestead, duly approved by the Secretary, would terminate the interest of the child Julia as to the part alienated, and as to the part so sold, the proceeds became at once divisible among the heirs.

Appellants further contend that the child Julia is not one of the heirs to the entire estate. This view is bound to be predicated solely on the assumption that Julia has a life estate, which is the very question

to be decided. It might be true that if she is given a life estate in the homestead, such estate would be exclusive, and she would not take as a general heir. Her interest in that case, however, would be greatly reduced where the land is chiefly valuable for minerals, as the life tenant cannot open new mines. Thus the rule adopted by the decision of the lower courts is more favorable, in the instant case, to her than to have held that she had a life estate, had the remaindermen refused to execute the lease, because if she is not a life tenant, we take it that no one would contend that she is not an heir under the provisions of section 9, adopting the laws of descent and distribution of the State of Oklahoma.

Appellants seek to reinforce their construction, that the child Julia takes a life estate, with the proposition that under section 7 of the Act of March 1, 1901, 31 Stat. 861, and section 16 of the Act of June 30, 1902, 32 Stat. 500, quoted on page 8 of their brief, provision was made for Creek children born after May 25, 1901, and that any other construction than the one contended for by them would impute to Congress an intention to violate solemn agreements with the Creek tribe. Not so. This contention of appellants overlooks that by Act March 3, 1905, 33 Stat. 1048, 1071, the tribal rolls were reopened to such Creek children, with other tribal children, so as to

include all those living on March 4, 1905, and that by Act of April 26, 1906, 34 Stat. 137, section 2, the tribal rolls were again reopened to Choctaw, Chickasaw, Cherokee and Creek minors living on March 4, 1906, thus supplanting the quoted provisions of said sections 7 and 16 by the substitution of a larger provision. But even by said sections 7 and 16 of the Acts of March 1, 1901, and June 30, 1902, respectively, the children therein provided for would not take a life estate, but only the right of use during the period of restriction as defined in those Acts. We cannot find any express decision that no life estate was created by sections 7 and 16, but the only sound interpretation, in our judgment, is that the provision simply gave the after-born children a right of use during the remainder of the period of restriction, instead of the restrictions passing off immediately upon the death of the allottee. But if there is any support to be found for the view that any greater interest was intended, it is significant that there are no such qualifications to the period of use in those sections as occur in section 9. In considering whether sections 7 and 16 making a provision for Creek afterborns specially, there being no corresponding provision made for such children of other tribal parents, were intended to be retained by section 9 it would seem a convincing reason against such implication that such former sections dealt with Creek children

alone, whereas section 9 of the Act of May 27, 1908, was a general enactment for all the Five Civilized Tribes.

The meaning of the second proviso of section 9 being natural and apparent, that the homestead should remain inalienable only for 21 years at the utmost, and subject to earlier termination, the conviction is irresistible that the contention for a life estate arises only out of the words "during their life or lives." Except for these words, doubtless no such contention would ever have been conceived. But, as already suggested, this expression has frequently occurred in the acts dealing with the Five Civilized Tribes, and always for the purpose of shortening the period of limitation on alienation. Thus section 12 of the Choctaw-Chickasaw Treaty, 32 Stat. 641:

> "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment * * * which shall be inalienable *during the lifetime* of the allottee, not exceeding twenty-one years from the date of certificate of allotment. * * *."

The same expression is used in section 13 of the same Act, and the same, identically almost, in section 13 of the Creek-Cherokee Treaty, 32 Stat. 716. Likewise, by section 8 Act of March 3, 1903, 32 Stat. 982, dealing with the Seminoles, it is said:

> "That the homestead referred to in said Act shall be inalienable *during the lifetime of the allottee,* not exceeding twenty-one years, from the date of the deed for the allotment." (Our italics.)

Construing section 12 *supra,* of the Choctaw-Chickasaw Treaty in *Mullen* v. *U. S.*, 224 U. S. 48, 56 L. ed. 834, this court said:

> "It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee."

To the same effect: *In re Lands of Five Civilized Tribes,* 199 Fed. 811; *Stout* v. *Simpson,* 34 Okla. 129, 124 Pac. 754.

Just as in the former acts the expression "during the lifetime of the allottee" was not used to define or create an estate, so the similar expression in section 9 "during their life or lives" was not employed for the purpose of defining or fixing a legal estate.

but merely, as in the former acts, to show that while the period of restriction on the homestead for the use and support was limited to April 26, 1931, the earlier death of the beneficiary would cancel the restriction. Such an interest, limited and bounded as it is, not only fails to answer to any definition in the books of a life estate, but violates every legal concept of such an estate.

To what character of estate or interest, then, does it belong? Naturally, it is in some respects to be homologated to the provisions customary in the statutes of many states affording homestead occupancy to minor children of decedents. We shall presently consider what use Congress intended might be made of the homestead allotment by such issue. But with reference to the duration of the use by such issue, which we have already seen is limited, at all events, to a time certain, subject to be cut down by death or by the act of the Secretary of the Interior, fits quite precisely the definition and nature of an estate or interest for years.

In 11 Am. & Eng. Encyc. L. 381, discussing estates for years, it is said:

> "The term 'years' is merely descriptive, as such estate may be for a shorter period, as a certain number of months or weeks; but the essential characteristic of the estate is that its duration must be fixed and certain. And in ascer-

taining whether this characteristic exists or not, the maxim *id certum est quod certum reddi potest* is applicable.

"No especial words are necessary for the creation of an estate for years, but any form of words indicating an intention to transfer the possession for a certain definite time is sufficient."

And an estate for years may be created by contract, devise, or arise under statutory provisions, and may begin *in futuro.*

—18 Am. & Eng. Encyc. L. 209.

It is inferior to a life estate, not being a freehold, and the tenant is without seizin. He is possessed, not of the land, but of the term for years, while the seizin is in the owner of the fee.

—18 Am. & Eng. Enc. L. (2d ed.) 210;
11 *Id.* 381;
Hutcheson v. *Bennefield,* (Ga.) 42 S. E. 422;
1 Woerner, Am. Law Admin. 231.

Consequently, a term for years will not support dower.

—1 Woerner, Am. Law Admin. 231.

In *Whittome* v. *Lamb,* 12 Mees. & Wels. 813, the will said:

"And it is my will and desire that my said wife shall have the use and occupation, or annual increase, at her pleasure, of all that, my

> said farm-house and premises * * * with the appurtenances, during the minority of my sons, she keeping" (in good repair).

It was held that the words "use and occupation" "during the minority of the sons," gave the widow a term for years, and not ceasing upon her death.

Whatever the nature of the use which the issue born after March 4, 1906, may make of the homestead allotment, two things appear certain: One is that the interest is not a life estate, for it has none of the elements of such estate, and is not a freehold; the other is that the tenancy is one for years. What is the nature of the use which such issue may make of the homestead allotment? Resort must be had, in the first instance, to ascertaining, if we can, the intention of Congress. That intention, if clearly manifested, will not be defeated by any narrow rule. In *United States* v. *Allen,* 179 Fed. 13, ... C. C. A. ...., wherein the right of the United States to maintain an action to enforce restrictions against the alienation of Indian lands was challenged upon the ground of lack of proprietary interest in the lands, the majority opinion says that the restrictions were to be viewed in the light of a great governmental scheme for the protection of the interests of the Indians and that its policy was not to be frustrated by

viewing the provisions merely as real estate transactions and bounding them by the strict rules of law between grantor and grantee. The circumstances of that case are, of course, widely different from those of this case, as well as the occasion for invoking that rule of view, since the construction involves the determination of private rights in the same piece of property between heirs of the same allottee and all direct parties to the legislation. And if the intention as to the extent and nature of the use be not obvious, then that intention should be found within familiar common law rules, and these be not breached to discover such intent. Guided, however, by the spirit of the rule stated by the court, we shall discover nothing in the manifested intention of Congress in section 9 transgressing the principles laid down by us.

In gleaning the legislative intent, some preliminary reflections arise at the threshold. It is to be well fixed in mind that the entire act in which the section occurs is one dealing with restrictions upon alienation. The section itself professedly deals with that subject, the special interest of the specified issue arising as if incidentally. This court, in *United States* v. *Knight*, 206 Fed. 145, quoted the language of the Supreme Court in *Tiger* v. *Western Development Co.*, 221 U. S. 286, with reference to section 9 of Act of May 27, 1908:

> "The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interest of full-blood Indians to be approved by a competent court,"

and added this language:

> "While the Supreme Court was not construing section 9, it was before the court, and we are informed as to what the court thought was its obvious purpose."

Such being the obvious purpose of section 9, and not the creation of particular estates in land; and the further fact remaining that the words under construction are contained in a proviso wherein, although it is competent, as pointed out in the *Tiger* case, to enact independent legislation, it is not customary, we are led to pause before indulging a belief that Congress intended to create so serious and important an estate in lands, to the exclusion of the other heirs, as the theory of appellants requires us to do.

We are furthermore bound to accept as true that Congress did not intend that such issue could or should execute a mineral lease of the kind in question, for the reason that it would be waste; for the further reason that rigid restrictions existed against such leasing which could only be removed by the Secretary of the Interior, and for the still further

reason that whatever use she might make of the allotment, she could only make such use as did not require the co-operation or joinder of the other heirs. Such use only was permitted to her as was reconcilable with each of these requirements, as to which we believe there can be no controversy or debate. No oil well or mine had ever been opened on the homestead at the allottee's death, nor was it even known that the land was mineral. A life tenant even, as we will hereafter demonstrate, could not open a new mine. A tenant for years, of course, could not. What, under all these conditions, which all must concede to be true, was intended by saying that the homestead should "remain inalienable, unless, etc., for her use and support"? Only such use as she could make under the above conditions, and which involved no act of alienation of any portion of the estate, for the express condition of the use conferred was that it remain inalienable. Inalienability and use and support were made coterminous. Within these conditions and limitations she must make her use. All these are necessarily implied and therefore as much a part of the law as that which is expressed. *(United States* v. *Allen, supra.)* When it comes to determine the extent and nature of the exercise of the use, which is not expressed, we are compelled to look for it within well recognized principles regulating rights between joint

heirs to the estate and depending upon the interpretation of the particular words, and we surely may assume that Congress intended that we might do so, no contrary intention appearing.

We will also look to other provisions affecting the subject matter, whether found in other acts and treaties, or in the same act containing the words of the grant. Looking to these it will be found that prior to the enactment of the Act of May 27, 1908, previous provision had been made for the execution upon the Secretary's approval of the mineral lease upon the homestead of a full-blood Creek. It will also be found that previous provision had been made for the making of an agricultural lease upon such homestead for not over five years, without approval. Subsequently an agricultural lease on such homestead for more than one year had been prohibited, as appears from the language of section 20, Act April 26, 1906 (34 Stat. L. 137), as follows:

> "*Sec. 20.* That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands *other than homesteads, of full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval; *provided,* that *allotments* of mi-

nors and incompetents may be rented or leased under order of the proper court: *Provided, further,* that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory," (Italics are ours)

when read in connection with section 19 of that act.

This was the last expression on the subject of renting homesteads either for mining or agricultural purposes, until the enactment of Act of May 27, 1908, and by section 2 of that act agricultural leases on homesteads for periods not exceeding one year are authorized without restriction, no approval of the Secretary thereto being required. Such section is as follows:

"*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper Probate Court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations pro-

vided by the Secretary of the Interior, and not otherwise: And *provided, further,* that the jurisdiction of the probate courts of the State of Oklahoma, over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

It will be readily observed in the foregoing section that in the provisos three different classes of leases are authorized to be made *with the approval* of the Secretary: *(1)* Leases of all restricted lands for oil, gas or other mining purposes, term not limited; *(2)* leases of restricted homesteads for more than one year *other* than oil, gas or other mining lease, *i. e.,* surface leases: *(3)* leases of restricted lands for periods of more than five years other than oil, gas or other mining leases. This third class would include homesteads, the words "restricted lands" being general and, therefore, the only reason for the specification of the second class of non-mineral leases for periods of more than one year on restricted homesteads was to show that such leases for not more than one year might be made without the Secretary's approval; in other words, there was no restriction on non-mineral leases on restricted homesteads for periods less than one year. We believe that this is a perfectly fair and logical de-

duction from the enumeration and specification of authorized leases in section 2.

What, then, follows? Of necessity—and there seems to us no escape from this conclusion—that the only use which Julia Willingham in her capacity as issue born after March 4, 1906, could make of the restricted homestead by and through her own act and independently of the Secretary's approval, and independently also of the joinder or co-operation of her co-heirs at law, was the execution, through her guardian and proper court approval, of a non-mineral lease for a period not to exceed one year. This being all the use of the restricted homestead which she in her capacity as such specified issue solely could make of the homestead, and special provision having been made in the same act for such leasing, and this being the only use to which the homestead could be devoted without removal of restrictions through the Secretary's approval, it appears to us that the reasoning is faultless that such was the use which Congress intended she could make of it—that is, through a hiring or letting of the premises for use or cultivation by others than the beneficiary individually, and when we add to this the consideration that such use comports with the legal principles concerning estates for life or years, and is that use which is alone permitted to such special tenants with-

in the ancient maxim of the law, it would appear that such conclusion is confirmed.

Another controlling rule of decision in cases involving the use which may be made of real estate by or on behalf of those not the owners of the fee, but for whom some special use has been created is that the court will take into consideration the circumstances and the customary and former uses made of the land. In a note to the case of *Lanyon Zinc Company* v. *Freeman et al.*, 68 Kan. 691, 1 Am. & Eng. Anno. Cases 406, it is said:

> "The construction to be placed upon a clause in a will which is claimed to confer authority on an executor to lease the lands for a certain purpose is governed by the familiar rule that the intention of the testator controls, and that intention is to be sought for in the language of the will, the condition of the testator and the surrounding circumstances. The purpose for which lands have been habitually used is an important and often determining consideration in arriving at the testator's intention as to the leasing thereof. If at the time of the execution of the will the lands were known to be valuable only for agricultural purposes a general authority to lease the lands would hardly include the power to lease for mining purposes."

This rule was invoked in *Reynolds* v. *Hanna*, 55 Fed. 783, in determining that a life tenant might make mineral use where "the chief and sole value of

the land was for coal mining purposes, and that the only profit to be derived therefrom was by sale or lease of the soil."

The case of *Lanyon Zinc Company* v. *Freeman et al.*, (Kan.) 75 Pac. 995, seems to us eminently in point. In that case Koontz, the testator, a resident of Ohio, died leaving a will in which he devised certain lands to his grandchildren with the condition embodied therein, that in the event the testator died before the period of eighteen years from the date of the will the executor and trustee should take charge of the premises, and "lease and maintain the same in repair and good condition, with a view to obtaining the best income therefrom without permitting the same to deteriorate in value or quality" until such period of eighteen years should elapse. The testator died in the same year that he executed his will, and consequently the provision inserted in the will directing him to lease and maintain the premises with a view to obtain the best income therefrom became of force. The widow of the testator declining to accept under the will, elected to take her one-half under the law of descent and distribution. Reuben R. Freeman qualified as executor and trustee of the estate. Shortly thereafter Freeman acquired the interest of one of the grandchildren devisee. Soon after acquiring this interest said Freeman, as

executor and trustee, and the widow jointly executed to the Lanyon Zinc Co. a lease granting unto the said company all the oil and gas under said premises, together with the right to enter thereon for drilling and operating for oil and gas, and reserving to the lessors the use of the premises for farming purposes, except such as used by the lessee, the lease providing that if no well should be drilled within ten years the lease should become void. Shortly afterward Freeman acquired the interest of another of the grandchildren in the premises. After all this one Taylor acquired the interest of the widow in the premises. Thereafter Taylor filed his suit for partition and the Lanyon Zinc Co. was made a party and contended that the interest of all the parties were subject to its claim under said oil and gas lease, and the validity of such lease was drawn in question. The court set apart the east half of the leased premises to the plaintiff as the widow's interest acquired by him, and as to that part held the lease of the Lanyon Zinc Company was in full force. But as to the west half, the court held the lease void in so far as it was executed by Freeman in his capacity as executor and trustee, on the ground that a mineral lease was not authorized by the quoted provision of the will and cancelled it to that extent, upholding it, however, as to the individual interest of Freeman acquired under the two grandchildren

devisees. The opinion is so applicable to the instant case that we quote at length from it:

> "Whether this oil and gas lease to the Lanyon Zinc Company was valid as against the interest of the said legatees in said premises must be determined by the extent of the authority given Reuben R. Freeman as executor and trustee under the will. The will provided that he 'lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality.' This language of the will can best be interpreted, and the intention of the testator best understood, in the light of the facts and surroundings at the time it was made. The admitted facts and the evidence disclose that the testator was a resident of Ohio. The land was farming land, and used for that purpose only. The surrounding lands were agricultural, and used for that purpose only. Natural gas had but recently been found in the neighborhood, and was being somewhat used in the City of Iola, not far distant. It can scarcely be said oil had been found in the neighborhood at that time. No gas or oil wells had been sunk upon these premises. None have since been sunk thereon. The oil and natural gas industry in that vicinity was then in fact new, and in its infancy. Did the testator contemplate the making of a lease to include the mineral below the surface, or did he contemplate the leasing of the surface of the land only? It is quite unlikely that he had in mind or intended other

than the leasing of the surface of the premises for agricultural purposes. Again, the lease to the Lanyon Zinc Company in controversy contemplated not the usual tilling or cultivation of soil and the growing of crops thereon. It granted to the Lanyon Zinc Company all the oil and gas under the premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas and the right to erect and maintain thereon and remove therefrom buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil and gas. Whatever may be the origin of petroleum and natural gas—and the question appears to be yet a matter of controversy—it is well settled that they are minerals. (Donahue on Petroleum and Gas, Secs. 7, 8; Thornton on Oil and Gas, Sec. 19.) Petroleum and gas, so long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it, so long as they are on it, or in it, or subject to his control. When they escape and go into other lands, or come under another's control, the title of the former owner is gone. (*Brown* v. *Spillen,* 155 U. S. 665, 15 Sup. Ct. 245, 30 L. ed. 304; *Oil Co.* v. *Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729; *Murray* v. *Allred,* 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Kelley* v. *Ohio Oil Co.,* 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721.) In the case of *Wilson* v. *Youst,* 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, the court held that an oil lease investing the lessee with the right to

remove all the oil in place in the premises in consideration of his giving the lessors a certain per cent thereof is, in legal effect, a sale of a portion of the land. In the case of *Stoughton's Appeal*, 88 Pa. 198, it was said that: 'A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease, but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is a part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of the *corpus* of the estate of his ward.' It was held in the case of *Marshall* v. *Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601, that 'a tenant for life has no right to operate for oil or gas, or to make oil or gas lease, unless operations for oil or gas were commenced before the life estate accrued.' To the same effect is the case of *Williamson* v. *Jones*, (W. Va.) 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, and the case of *Hook* v. *Garfield Coal Co.*, (Iowa) 83 N. W. 963. We do not believe, from the language used in the will, and the circumstances and surroundings at the time it was made, that it was the intention of the testator to authorize the executor and trustee to execute the oil and gas lease in controversy to the Lanyon Zinc Company. Nor did the will authorize Freeman, as executor and trustee, to execute the lease in controversy, and bind thereby the interest of the legatees."

Neither at the time the act in question was passed, nor at the death of the allottee, Emma Derrisaw, as has been said, was it known that the homestead was underlaid with oil or gas or possessed any mineral character whatever. Had the grant of the interest given to Julia Willingham been contained in the terms of a will, or private grant, as in the case just cited, instead of in the section under discussion, with express power to lease, there can be no doubt in such instance that neither the beneficiary nor executor or trustee in her behalf could have executed under the power the oil·lease in question, for the reason independently of others which we have noted, that a mineral lease was not contemplated under the power, but only the agricultural, or ordinary surface use intended.

Next, we assert that the lower courts were correct in holding that the approval of the oil and gas lease was, within the meaning of the Act of Congress, an alienation of the land, or the affected portion thereof. Nor do we understand that the appellants question in this court the correctness of such ruling, but only that Julia's interest in her mother's estate is exclusive and not subject to termination by removal of restrictions or alienation. Nevertheless, to a true determination of that question, this court, if it should feel a doubt upon it, is en-

titled to any assistance which counsel may be able to afford, and we, therefore, present the results of our investigation on that question, although the able and convincing majority opinion of the Circuit Court of Appeals in this case is exhaustive of that question. Indeed as we read his opinion, Judge REED did not dissent from that conclusion of the majority opinion.

The approval of the oil and gas lease did not effect, to be sure, a complete alienation of the land from the heavens to the center of the earth, but under the terms of the lease and the nature of the property conveyed, it was, in fact and in law, an alienation of the most material and substantial portion of the estate, and a transfer of that portion which we have seen Julia Willingham by virtue of her special interest for use and support could not have made. It was a transfer, too, which involved the removal of an ironclad restriction against such disposition against that part of the estate. The lease is for a term of ten years of all the gas and oil, and with the right to continue in perpetuity the taking of the oil and gas. That, under the authorities, was clearly a sale of that portion of the *corpus* of the estate for it is apparent that the use of the land for oil mining purposes practically absorbs its value.

This court has, it seems to us, laid down the principles which are decisive of this question in the

case of *United States* v. *Noble,* 237 U. S. 74, 59 L. ed. 844. The case arose out of a mineral lease of the allotment of a Quapaw Indian. The Act of March 2, 1895, made the allotment inalienable for twenty-five years from the date of patent. A later act authorized the allottee to lease the allotment for a period of ten years. A lease was made under authority of the later act reserving royalties (also other leases), and afterwards the royalties were assigned. The later act authorizing the lease was regarded by this court as a removal *pro tanto* of the restriction against alienation, and the rents and royalties to accrue under the lease as part of the estate remaining in the lessor, and which by reason of the restriction the lessor could not assign. For the convenience of the court, we copy that part of its opinion more directly bearing:

> "*1.* We may first consider the assignments of rents and royalties. Under his patent, the allottee took an estate in fee, subject to the limitation that the land should be 'inalienable for the period of twenty-five years' from date. This restriction bound the land from the time stated, whether in the hands of the allottee or his heirs. *Bowling* v. *United States, supra.* It put it beyond the power of him, or of them, to alienate the land, or any interest therein, in any manner except as permitted by the Acts of 1896 and 1897. See *Taylor* v. *Parker,* 235 U. S. 42, *ante,* 121, 35 Sup. Ct. Rep. 22. The comprehen-

siveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. The rents and royalties were profits issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. 1 Washb. Real Prop. 337; *Wright* v. *Williams*, 5 Cow. 501. It is true that the owner of the reversion, when unrestricted in his right to convey, may sever the rent and grant it separately, but this is by virtue of his freedom to deal with the estate in the land. 2 Bl. Com. 176.

"It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land. The further argument is made that the power to lease should be construed as implying the power to dispose of the rents to accrue. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties to

accrue as part of the estate remaining in the lessor. It was the intent of Congress that the allottees, during the period of restriction, should be secure in their actual enjoyment of their interest in the land. *Heckman* v. *United States, supra.* The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute."

Discussing the two assignments of royalties, the court said:

> "Both were assignments of interests which pertained to the reversion, and both must be held to be invalid under the statute."

In *United States* v. *Gratiot,* 14 Pet. (U. S.) 526, the Supreme Court held that an instrument which was a lease for smelting lead ore was one that could be properly executed under authority of the words, "dispose of" the public lands used in the constitution; in other words, that a mineral lease was a disposal of land.

If we have misconstrued or misapplied these cases from this court, then we beg that the court give consideration to the following authorities:

The Supreme Court in *Burke* v. *Southern Pacific Railroad Co.,* 234 U. S. 669, 58 L. ed. 1527, has settled that petroleum or mineral oil is a mineral, consequently it becomes like coal, or other mineral in place. The authorities are in practical harmony that a lease

of all the minerals, or of the oil and gas, upon premises containing terms substantially like the lease in the instant case constitutes a sale to that extent of the land.

—*Moore* v. *Sawyer*, 167 Fed. 826, 836;

Eldred v. *Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929;

Sharp et al. v. *Lancaster*, (Okla.) 100 Pac. 578;

Barnes v. *Stonebraker*, (Okla.) 100 Pac. 579;

Barnes v. *Stonebraker*, (Okla.) 113 Pac. 903;

Barnes v. *Keys*, (Okla.) 127 Pac. 261;

Stoughton's Appeal, 88 Pa. 201.

Marshall v. *Mellon*, 179 Pa. 371, 35 L. R. A. 816, 819;

Blakely v. *Marshall*, 34 Atl. (Pa.) 564.

Wilson v. *Youst et al.*, (W. Va.) 28 S. E. 781;

Williamson et al. v. *Jones*, (W. Va.) 27 S. E. 411;

Tidwell v. *Dobson*, (Okla.) 131 Pac. 693;

Brooks v. *Cook*, (Ala.) 38 So. Rep. 641;

Haskell v. *Sutton*, (W. Va.) 44 S. E. 533;

Brewster v. *Lanyon Zinc Co.*, (C. C. A.) 140 Fed. 801;

U. S. v. *Noble*, (C. C. A.) 197 Fed. 292;

Truskett v. *Closser*, (C. C. A.) 198 Fed. 835;

Hook v. *Garfield Coal Co.*, (Iowa) 83 N.W. 963;

South Penn Oil Co. v. *McIntyre,* 44 W. Va. 305, 22 S. E. 926;

Guffey v. *Smith,* 237 U. S. 101, 113, 59 L. ed. 856, 863.

Eldred v. *Okmulgee Loan & Trust Co., supra,* is a well-considered case holding that an oil and gas lease was an alienation, not only within the meaning and intent of the Act of Congress, but also by the general principles relating to the conveyance of the estate, and in a discriminating review of the common law authorities showing that such a lease is an alienation by deed. This case has been followed uniformly by the subsequent decisions of the Supreme Court of Oklahoma. (See authorities *supra.)*

In *Duff* v. *Keaton,* 33 Okla 92, 124 Pac. 291, wherein the Supreme Court of Oklahoma, after a careful review of the particular statutes of that state, which constitute the procedure for the sale of the lands of minors, held that an oil and gas lease was not a "sale" of lands within the meaning of those statutes, carefully pointed out that its decision did not conflict with the *Elred* case, saying: "This conclusion does not militate against the rule announced in *Elred* v. *Okmulgee Loan & Trust Co.,* 22 Okla. 748, 98 Pac. 929," and then proceeds to restate what had been held in that case. In *Barnes* v. *Keys,* (Okla.) 127 Pac. 261, cited by appellants, the court said:

"As was held in *Stoughton's Appeal,* 88 Pa. 201, and other cases in the same line, oil in place is a mineral, and being a mineral is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises."

In *Brooks* v. *Cook, supra,* the court said:

"Rent is the consideration paid for the use of the land. Whether you denominate it a lease or by any other name, when a man acquires the right to take ore out of the land, he takes away a part of the substance of the real estate itself, and whether the consideration be called 'royalty' or by any other name, it is paid for the purchase of the substance which is taken away. Consequently, such a contract is a conveyance of a part of the real estate, and must be executed with the formalities required for conveyances of real estate. *Milliken* v. *Faulk,* 111 Ala. 658, 20 South. 594. In a case before the House of Lords in England, which was a mineral lease for 21 years, Lord Cairns said: 'Although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term, and there are no period-

ical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there, if he can find them, and to take them away, just as if he had bought so much of the soil.' Scotch & D. Appeals L. R., pp. 273, 283, 284. The great weight of authority, as well as the logic of the situation, so fully bear out this principle that we consider it fully settled that minerals in the earth are a part of the real estate, and that any instrument by which they are conveyed must be executed in accordance with the law in regard to conveyances of land."

In *Brewster* v. *Lanyon Zinc Co., supra*, Judge Van Devanter, speaking for the court, said:

"The position is taken in the bill that by reason of the clause which declares: 'Second party (the lessee) may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void'—the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally determinable at the will of the lessor. The position is not sound. Although the parties with the sanction of a general practice denominated the instrument a 'lease,' strictly speaking it was not such, but was more in the nature of a grant *in praesenti* of all the oil and gas in the lands described—these min-

erals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. *Lanyon Zinc Co.* v. *Freeman,* (Kan.) 75 Pac. 995; *Dickey* v. *Coffeyville Vitrified Brick & Tile Co.,* (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors and assigns, is without limitation as to time, and plainly shows that it is designated to be perpetual, if the oil or gas shall continue, and the lessee and those claiming under it shall fulfill its stipulations."

In *Hook* v. *Garfield Coal Co.,* (Iowa) 83 N. W. 963, the testator said in his will: "I give and bequeath unto my wife, Mary T. Thrash, all of my property, both real, personal and mixed of whatsoever kind and wheresoever situated, to have and to hold as long as she may live, and to use the same for her support in any manner she chooses, *except she is not to sell* any of the real estate I may die possessed of." The widow entered into a lease of the land for the purpose of mining coal. The lessee was to operate the mine in a businesslike manner, remove all the merchantable coal, and pay a royalty of 10 cents per ton for all merchantable coal. Speaking with reference to the validity of this lease under the power in the will the court said:

"The will clearly devised but a life estate to Mary T. Thrash. True, she had the right to

use the land for her support in any manner she saw fit, but she was expressly denied the right of sale. The execution of the mining lease was a sale of the property. The coal underneath the surface was a part of the real estate, and the lease thereof, in the form in which it was executed, was a transfer thereof. *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Appeal of Duff*, (Pa. Sup.) 14 Atl. 364; *Railway Co.* v. *Sanderson*, 109 Pa. St. 585, 1 Atl. 394. We need not determine whether it passed title to unmined coal, for that question is not in the case. It surely passed title to all that was mined, and was therefore a sale of real estate."

Equally pertinent and vigorous is the language of the court in *Haskell* v. *Sutton, supra*, quoted in the opinion from the case of *South Penn. Oil Co.* v. *McIntyre*, 44 W. Va. 305, 22 S. E. 926:

"Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court. A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without approval of the orphans' court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is part of the realty; and a guardian

cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the *corpus* of the estate of his ward."

We take it, therefore, that the authorities without any real conflict unite in holding that a mineral lease of the nature and terms of the one in controversy is an alienation, or sale of land.

We think it also true that it is an alienation in the sense in which such term is used in the Act of Congress. We have already alluded to and cited the various restrictions against mineral leasing contained in the several treaties with the Indian tribes and the Acts of Congress dealing with Indian allotments. Side by side with all these are found in each instance general restrictions against alienation of the lands of the allottees. These are followed by the various sections permitting mineral leases to be made upon approval thereof by the Secretary of the Interior. That such leasing is included within the general restrictions on alienation is conclusively shown by the sections inserted in juxtaposition authorizing the leasing. Thus it is placed beyond debate that a restriction on alienation is a restriction on mineral leasing. Conversely it must be true that a removal of restrictions against leasing is a removal of restrictions against alienation. The ap-

proval of a lease is as much a removal of restriction to the extent that it goes as any general order removing restrictions, so far as the nature of the two acts is concerned, because they involve equally the exercise of the same investigation, judgment, and *quasi*-judicial discretion by the same officer, the Secretary of the Interior, in each instance. Indeed, since the approval of the lease is to be made according to the rules and regulations prescribed by the Secretary of the Interior he may prescribe the same rules for both, or different rules and regulations for each, so that the manner of the exercise of the power, being arbitrary, is immaterial. The fact remains that in substance the two acts of removal are in nature and essence the same. It will be noted that section 9 in the proviso under discussion uses the words: "Unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof."

Appellants urge, however, that as section 9 says, "in the manner provided by section one," and as the removal of restrictions on leases is provided in section 2, that leases are not contemplated. This would seem technical. Leases being a species of alienation, and included in the general power of removal of restrictions conferred by section 1, its repetition in section 2 cannot take it away. Besides, if literalness be insisted on, it might equally be con-

tended that the provision in section 9 for the removal of restrictions "in the manner provided by section one," is without meaning, for no particular manner of removal except by reference is specified in section 1. However, it is there said that the Secretary "may remove such restrictions, *wholly or in part, under such rules and regulations* * * * *as he may prescribe;*" and "continue to remove restrictions *as heretofore,*" and this is the "manner" meant by section 9, and the language, therefore, is appropriate for the inclusion of leases.

There is yet another reason why leases are included. Section 1 says the Secretary "may remove such restrictions." What restrictions? We find the answer in the opening words of section 1:

> " * * * That from and after sixty days from the date of this act, the status of the land allotted * * * shall as regards restrictions on alienation *or incumbrances* be as follows: * * * All homesteads * * * and all allotted lands * * * shall not be subject to alienation, contract to sell, power of attorney, *or any other incumbrance* * * * except that the Secretary of the Interior may remove such restrictions * * * ." (Italics ours.)

Now an "incumbrance" certainly includes a lease. *Hoover* v. *Chambers,* (Wash. Ty.) 13 Pac. 547. When, therefore, it was said in section 9 that the homestead should be made inalienable, and thus

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the restrictions against alienation removed by the Secretary in the manner provided in section 1, restrictions against leasing are just as much included as any other species of alienation. Neither are we to overlook the words that the Secretary may remove such restrictions "wholly or *in* part." The approval of an oil and gas lease is a removal of restrictions "in part."

It will be found in every instance affecting the validity of leasing of their allotments by members of Indian tribes, that such leasing is uniformly treated as falling within the prohibitions upon the alienation of their lands. It is thus well established from the acts and the treaties, and by the interpretation and the construction thereon placed by the courts, that restrictions upon alienation are restrictions upon leasing; that leasing is alienation. We lay this proposition down from the acts and decisions with the utmost confidence that it cannot be successfully questioned or assailed. It must follow, therefore, from the strictest rules of logic, of precedent and of common sense, that the Supreme Court of Oklahoma was correct in saying as it did in the case of *Eldred* v. *Okmulgee Loan & Trust Co.* that an oil and gas lease was an alienation within the meaning of the Acts of Congress governing restrictions upon alienation, and that the lower courts were likewise correct in so saying in the instant case.

When, therefore, the Secretary of the Interior removed the restrictions upon mineral leasing of the homestead allotment of Emma Derrisaw he did that which terminated any special interest which Julia Willingham may have had, if any, as to such portion of the estate, and the proceeds thereupon became immediately divisible, the descent having been already cast.

—*Bartlett* v. *Okla Oil Co. et al.*, (E. D. Okla.) 218 Fed. 380;
Doe v. *Considine*, 73 U. S. 458, 18 L. ed. 869;
Fitzpatrick's Estate, 233 Pa. St. 33, 27 Am. & Eng. Anno. Cas. 320, and note.

Appellants also argue (p. 15) that, considering the lease as a sale of that part of the land consisting of oil and gas, the decree of an equal division cannot be sustained because the heirs having joined in the lease, the life tenant is entitled to the income on all the royalty funds at not less than legal interest during her life, and cite *Barnes* v. *Keys*, 36 Okla. 6. This argument rests on the predicate that Julia is a life tenant, whereas that is the question for decision. The argument also overlooks that alienation of such part of the land, by the very terms of the act, discontinues her special interest as to the part of the land consisting of the oil and gas. In truth, since she alone could not make an oil and gas ~~tenant~~ lease or open a mine, she really had no

usable or practicable interest in that part, and the decree is highly beneficial to her. Appellants, while urging that Congress does not deal in common law technicalities, still invoke the strict application of the rule of law for the division of royalties between life tenants and remaindermen. By that rule, as laid down in *Barnes* v. *Keys*, the royalties would remain indivisible for Julia's life, and she having, as the youngest of them, the longest expectation of life, her father and sister would die without ever having received any portion of the royalties; or, if their present interest was distributed to them, they would receive, according to the calculation in *Barnes* v. *Keys*, only about one-sixth, and the remainder, together with all the surface use—practically the entire estate—would go to Julia, thus giving her an interest far in excess of the provision evidently intended for her, and in effect excluding the other heirs. If that result had been intended, it would have been about as well, and far simpler, for Congress to have said that the entire homestead should descend to the after-born child. Appellants further argue, in this connection, that as the lease provides that it is subject to the regulation of the Secretary of the Interior, that the Secretary may provide for investment of the royalty fund during the life of Julia for her use and benefit. It would seem unnecessary to point out in answer to this that the

power of the Secretary to regulate the custody and disbursement of the royalties is not the equivalent of the right to adjudge ownership as between the beneficiaries, but will be exercised only upon the respective shares of each in accordance with their rights.

We respectfully submit there is no error in the decrees of the Circuit Court of Appeals and of the District Court, and that the judgment appealed from should be affirmed.

WILLIAM J. HORTON,
McAlester, Oklahoma;
RALPH A. SMITH,
Tulsa, Oklahoma;
Attorneys for Appellee Tootie Riley.